Google Inc. et al v. Egger et al
Doc. 441 Att. 5

Exhibit 6

Dockets.Justia.com

94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-755

SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS

BOOK III

FINAL REPORT

OF THE

SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS

WITH RESPECT TO

INTELLIGENCE ACTIVITIES

UNITED STATES SENATE

APRIL 23 (under authority of the order of APRIL 14), 1976

U.S. GOVERNMENT PRINTING OFFICE

69-984 O

WASHINGTON : 1976

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $7.65

A. "Counterintelligence Program": A Misnomer for Domestic Covert Action

COINTELPRO is an acronym for "counterintelligence program." Counterintelligence is defined as those actions by an intelligence agency intended to protect its own security and to undermine hostile intelligence operations. Under COINTELPRO certain techniques the Bureau had used against hostile foreign agents were adopted for use against perceived domestic threats to the established political and social order. The formal programs which incorporated these techniques were, therefore, also called "counterintelligence." [2a]

"Covert action" is, however, a more accurate term for the Bureau's programs directed against American citizens. "Covert action" is the label applied to clandestine activities intended to influence political choices and social values.[3]

B. Who Were the Targets?

1. The Five Targeted Groups

The Bureau's covert action programs were aimed at five perceived threats to domestic tranquility: the "Communist Party, USA" program (1956–71); the "Socialist Workers Party" program (1961–69); the "White Hate Group" program (1964–71); the "Black Nationalist-Hate Group" program (1967–71); and the "New Left" program (1968–71).

2. Labels Without Meaning

The Bureau's titles for its programs should not be accepted uncritically. They imply a precision of definition and of targeting which did not exist.

Even the names of the later programs had no clear definition. The Black Nationalist program, according to its supervisor, included "a great number of organizations that you might not today characterize as black nationalist but which were in fact primarily black." [3a] Indeed, the nonviolent Southern Christian Leadership Conference was labeled as a Black Nationalist "Hate Group." [4] Nor could anyone at the Bureau even define "New Left," except as "more or less an attitude." [5]

Furthermore, the actual targets were chosen from a far broader group than the names of the programs would imply. The CPUSA program targeted not only Party members but also sponsors of the

---

[2a] For a discussion of U.S. intelligence activities against hostle foreign intelligence operations, see Report on Counterintelligence.

[3] See Senate Select Committee Report, "Alleged Assassination Plots Involving Foreign Leaders" and Staff Report: "Covert Action in Chile."

[3a] Black Nationalist Supervisor deposition, 10/17/75, p. 12.

[4] Memorandum from FBI Headquarters to all SAC's, 8/25/67, p. 2.

[5] New Left Supervisor's deposition, 10/28/75, p. 8. The closest any Bureau document comes to a definition is found in an investigative directive: "The term 'New Left' does not refer to a definite organization, but to a movement which is providing ideologies or platforms alternate to those of existing communist and other basic revolutionary organizations, the so-called 'Old Left.' The New Left movement is a loosely-bound, free-wheeling, college-oriented movement spearheaded by the Students for a Democratic Society and includes the more extreme and militant anti-Vietnam war and anti-draft protest organizations." (Memorandum from FBI Headquarters to all SAC's, 10/28/68; Hearings, Vol. 6, Exhibit 61, p. 669.) Although this characterization is longer than that of the New Left Supervisor, it does not appear to be substantively different.

National Committee to Abolish the House Un-American Activities Committee [6] and civil rights leaders allegedly under Communist influence or simply not "anti-Communist." [7] The Socialist Workers Party program included non-SWP sponsors of antiwar demonstrations which were cosponsored by the SWP or the Young Socialist Alliance, its youth group.[8] The Black Nationalist program targeted a range of organizations from the Panthers to SNCC to the peaceful Southern Christian Leadership Conference,[9] and included most black student groups.[10] New Left targets ranged from the SDS [11] to the Interuniversity Committee for Debate on Foreign Policy,[12] from all of Antioch College ("vanguard of the New Left") [13] to the New Mexico Free University [14] and other "alternate" schools,[15] and from underground newspapers [16] to students protesting university censorship of a student publication by carrying signs with four-letter words on them.[17]

C. What Were the Purposes of COINTELPRO?

The breadth of targeting and lack of substantive content in the descriptive titles of the programs reflect the range of motivations for COINTELPRO activity: protecting national security, preventing violence, and maintaining the existing social and political order by "disrupting" and "neutralizing" groups and individuals perceived as threats.

1. Protecting National Security

The first COINTELPRO, against the CPUSA, was instituted to counter what the Bureau believed to be a threat to the national security. As the chief of the COINTELPRO unit explained it:

> We were trying first to develop intelligence so we would know what they were doing [and] second, to contain the threat.... To stop the spread of communism, to stop the effectiveness of the Communist Party as a vehicle of Soviet intelligence, propaganda and agitation.[17a]

Had the Bureau stopped there, perhaps the term "counterintelligence" would have been an accurate label for the program. The ex-

---

[6] Memorandum from FBI Headquarters to Cleveland Field Office, 11/6/64.

[7] One civil rights leader, the subject of at least three separate counterintelligence actions under the CPUSA caption, was targeted because there was no "direct evidence" that he was a communist, "neither is there any substantial evidence that he is anti-communist." One of the actions utilized information gained from a wiretap; the other two involved dissemination of personal life information. (Memorandum from J.A. Sizoo to W.C. Sullivan, 2/4/64; Memorandum from New York Field Office to FBI Headquarters, 2/12/64; Memoranda from FBI Headquarters to New York Field Office, 3/26/64 and 4/10/64; Memorandum to New York Field Office from FBI Headquarters, 4/21/64; Memorandum from FBI Headquaters to Baltimore Field Office, 10/6/65.)

[8] Memorandum from FBI Headquarters to Cleveland Field Office, 11/29/68.

[9] FBI Headquarters memorandum, 8/25/67, p. 2.

[10] Memorandum from FBI Headquarters to Jackson Field Office, 2/8/71, pp. 1–2.

[11] Memorandum from FBI Headquarters to San Antonio Field Office, 10/31/68.

[12] Memorandum from FBI Headquarters to Detroit Field Office, 10/26/66.

[13] Memorandum from FBI Headquarters to Cincinnati Field Office, 6/18/68.

[14] Memorandum from FBI Headquarters to Albuquerque Field Office, 3/14/69.

[15] Memorandum from FBI Headquarters to San Antonio Field Office. 7/23/69.

[16] Memorandum from FBI Headquarters to Pittsburgh Field Office, 11/14/69.

[17] Memorandum from FBI Headquarters to Minneapolis Field Office, 11/4/68.

[17a] COINTELPRO Unit Chief deposition, 10/16/75, p. 14.

DR. MARTIN LUTHER KING, JR., CASE STUDY

I. INTRODUCTION

From December 1963 until his death in 1968, Martin Luther King, Jr. was the target of an intensive campaign by the Federal Bureau of Investigation to "neutralize" him as an effective civil rights leader. In the words of the man in charge of the FBI's "war" against Dr. King:

> No holds were barred. We have used [similar] techniques against Soviet agents. [The same methods were] brought home against any organization against which we were targeted. We did not differentiate. This is a rough, tough business.[1]

The FBI collected information about Dr. King's plans and activities through an extensive surveillance program, employing nearly every intelligence-gathering technique at the Bureau's disposal. Wiretaps, which were initially approved by Attorney General Robert F. Kennedy, were maintained on Dr. King's home telephone from October 1963 until mid-1965; the SCLC headquarter's telephones were covered by wiretaps for an even longer period. Phones in the homes and offices of some of Dr. King's close advisers were also wiretapped. The FBI has acknowledged 16 occasions on which microphones were hidden in Dr. King's hotel and motel rooms in an "attempt" to obtain information about the "private activities of King and his advisers" for use to "completely discredit" them.[2]

FBI informants in the civil rights movement and reports from field offices kept the Bureau's headquarters informed of developments in the civil rights field. The FBI's presence was so intrusive that one major figure in the civil rights movement testified that his colleagues referred to themselves as members of "the FBI's golden record club."[3]

The FBI's formal program to discredit Dr. King with Government officials began with the distribution of a "monograph" which the FBI realized could "be regarded as a personal attack on Martin Luther King,"[4] and which was subsequently described by a Justice Department official as "a personal diatribe . . . a personal attack without evidentiary support."[5]

Congressional leaders were warned "off the record" about alleged dangers posed by Reverend King. The FBI responded to Dr. King's receipt of the Nobel Peace Prize by attempting to undermine his reception by foreign heads of state and American ambassadors in the countries that he planned to visit. When Dr. King returned to the fense, the Director of the Secret Service, and the Attorney General.[404] A copy was subsequently sent to the Commandant of the Marine Corps, who had been interested in "King's activities in the civil rights movement but recently had become quite concerned as to whether there are any subversive influences which have caused King to link the civil rights movement with the anti-Vietnam War movement." The Domestic Intelligence Division recommended that a copy be given to the Marine Commandant because "it is felt would definitely be to the benefit of [the Commandant] and to the Bureau. . . ." [405]

---

[1] William Sullivan testimony, 11/1/75, p. 97.
[2] Memorandum from Frederick Baumgardner to William Sullivan, 1/28/64.
[3] Andrew Young testimony, 2/19/76, p. 55.
[4] Memorandum from Alan Belmont to Clyde Tolson, 10/17/63.
[5] Burke Marshall testimony, 3/3/76, p. 32.

In February 1968, FBI Headquarters learned that Dr. King planned a "Washington Spring Project" for April 1968. According to a Domestic Intelligence Division memorandum, the Director suggested that the King monograph be again revised. That memorandum noted:

> Bringing this monograph up-to-date and disseminating it at high level prior to King's "Washington Spring Project" should serve again to remind top-level officials in Government of the wholly disreputable character of King. . . .
>
> Because of the importance of doing a thorough job on this, we will conduct an exhaustive field review to bring together the most complete and up-to-date information and to present it in a hard-hitting manner.[406]

The revised monograph, dated March 12, 1968, was disseminated to the White House, the Attorney General, and the heads of various government intelligence agencies.[407]

3. Attempts to Discredit Dr. King By Using the Press

Despite Cartha DeLoach's assurances to Andrew Young and Ralph Abernathy that the FBI would never disseminate information to the press, the Bureau continued its efforts to cultivate "friendly" news sources that would be willing to release information unfavorable to Dr. King. Ralph McGill, the pro-civil rights editor of the *Atlanta Constitution*, was a major focus of the Bureau's attentions. The Bureau apparently first furnished McGill with derogatory information about Dr. King as part of an attempt to dissuade community leaders in Atlanta from participating in a banquet planned to honor Dr. King upon his return from the Nobel Prize ceremonies. After a meeting with McGill, William Sullivan reported that McGill said that he had stopped speaking favorably of Dr. King, that he had refused to take an active part in preparing for the banquet, and that he had even taken steps to undermine the banquet. McGill's version of what transpired will never be known, since McGill is deceased. According to Sullivan's memorandum, however:

> Mr. McGill told me that following my first discussion with him a few weeks ago he contacted a banker friend in Atlanta who was helping to finance the banquet to be given King next Wednesday night. The banker was disturbed and said he

---

[404] Letters from J. Edgar Hoover to the Attorney General; Director, U.S. Secret Service; the Secretary of State; the White House; and the Secretary of Defense, 4/10/67.

[405] Memorandum from Charles Brennan to William Sullivan, 8/30/67.

[406] Memorandum from George Moore to William Sullivan, 2/29/68.

[407] Memoranda from George Moore to William Sullivan, 3/11/68 and 3/19/68.

with a foreign power is unconstitutional under the Fourth Amendment.[269]

VII. DOMESTIC SURVEILLANCE ABUSE QUESTIONS

The possibilities for abuse of warrantless electronic surveillance have clearly been greatest when this technique is directed against American citizens and domestic organizations. The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated. Americans who violated no criminal law and represented no genuine threat to the "national security" have been targeted, regardless of the stated predicate. In many cases, the implementation of wiretaps and bugs has also been fraught with procedural violations, even when the required procedures were meager, thus compounding the abuse. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information—unrelated to any legitimate governmental interest—about the personal and political lives of American citizens. The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials.

A. Questionable and Improper Selection of Targets

Judged against the principles established in the 1972 *Keith* case, nearly all of the Americans, unconnected with a foreign power, who were targets of warrantless electronic surveillance were improperly selected. Even without retrospective Fourth Amendment analysis of pre-*Keith* electronic surveillances, however, a close review of some of the particular cases [269a] outlined above suggests that (regardless of whether the ostensible predicate was violence, "subversion," or any other basis) the standards for approval of electronic surveillances were far too broad to restrict the use of this technique to cases which involved a substantial threat to the nation. Moreover, the use of warrantless electronic surveillance against certain categories of individuals, such as attorneys, Congressmen and Congressional staff members, and journalists, has revealed an insensitivity to the values inherent in the Sixth Amendment and in the doctrines of "separation of powers" and "freedom of the press."

1. Wiretaps Under the "Domestic Security" Standard

In 1940, President Roosevelt approved the use of wiretapping against "persons suspected of subversive activities against the Government of the United States." [270] As discussed in Section II, this formulation was supplemented by President Truman in 1946 to include "cases vitally affecting the domestic security, or where human life is in

[269] See p. 292.

[269a] The omission of other cases from the discussion which follows is not intended to suggest the conclusion that the use of electronic surveillance was justified or appropriate in such cases under the standards which existed at the time of the surveillance.

[270] Memorandum from President Roosevelt to the Attorney General, 5/21/40.

NATIONAL SECURITY AGENCY SURVEILLANCE AFFECTING AMERICANS

I. INTRODUCTION AND SUMMARY

This report describes the Committee's investigation into certain questionable activities of the National Security Agency (NSA).[1] The Committee's primary focus in this phase of its investigation was on NSA's electronic surveillance practices and capabilities, especially those involving American citizens, groups, and organizations.

NSA has intercepted and disseminated international communications of American citizens whose privacy ought to be protected under our Constitution. For example, from August 1945 to May 1975, NSA obtained copies of many international telegrams sent to, from, or through the United States from three telegraph companies. In addition, from the early 1960s until 1973, NSA targeted the international communications of certain American citizens by placing their names on a "watch list." Intercepted messages were disseminated to the FBI, CIA, Secret Service, Bureau of Narcotics and Dangerous Drugs (BNDD), and the Department of Defense. In neither program were warrants obtained.[2]

With one exception,[3] NSA contends that its interceptions of Americans' private messages were part of monitoring programs already being conducted against various international communications channels for "foreign intelligence" purposes. This contention is borne out by the record. Yet to those Americans who have had their communications—sent with the expectation that they were private—intentionally intercepted and disseminated by their Government, the knowledge that NSA did not monitor specific communications channels solely to acquire their messages is of little comfort.

In general, NSA's surveillance of Americans was in response to requests from other Government agencies. Internal NSA directives now forbid the targeting of American citizens' communications. Nonetheless, NSA may still acquire communications of American citizens as part of its foreign intelligence mission, and information derived from these intercepted messages may be used to satisfy foreign intelligence requirements.

NSA's current surveillance capabilities and past surveillance practices were both examined in our investigation. The Committee recog-

---

[1] See the Committee's Foreign Intelligence Report for an overview of NSA's legal authority, organization and functions, and size and capabilities.

[2] Since the NSA programs involving American citizens have never been challenged in court, the necessity of obtaining a warrant has not yet been determined. Although there have been court cases that involved NSA intercepts, NSA's activities have never been disclosed in open court. See pp. 765–766 of this Report and the Committee's Report on Warrantless FBI Electronic Surveillance for a discussion of warrant requirements for electronic surveillance.

[3] Between 1970 and 1973, NSA intercepted telephone calls between the United States and various locations in South America to aid the BNDD (now the Drug Enforcement Administration) in executing its responsibilitiees. See pp. 752–756.

This memorandum and subsequent testimony by NSA officials revealed that the CIA was monitoring these circuits to intercept the calls of American citizens suspected of illegal drug trafficking. During this period, NSA continued to monitor the same circuits at its East Coast site, but that site did not have the specific BNDD "sensitive" watch lists of American names which were supplied to the CIA. Thus, the conclusion reached by the Rockefeller Commission—that CIA intercepts were not undertaken for the purpose of gathering intelligence on American citizens—is not supported by the evidence.

3. Termination of Drug Activity

Three months after the CIA monitoring was initiated, CIA General Counsel Lawrence Houston issued an opinion which stated that the intercepts may violate Section 605 of the Communications Act of 1934.[73] This law, as amended in 1968, prohibits the unauthorized disclosure of any private communication of an American citizen to another party, unless undertaken pursuant to the President's constitutional authority to collect foreign intelligence which is crucial to the security of the United States.[74] Since intercepted messages were provided to BNDD, Houston concluded that the activity was for law enforcement purposes, which is also outside the CIA's charter. As a result of this memorandum, the CIA suspended its collection. NSA, which has no charter, continued to monitor these links for drug information.

NSA officials have testified that they were told in early 1973 that the CIA was terminating collection because it was concerned about operating an intercept station *within* the United States. This concern is completely different from the one expressed in Houston's memorandum. NSA officials have told the Committee that questions concerning the legality of the activity were either not mentioned by the CIA,[75] or else mentioned secondarily.[76]

NSA Deputy Director Buffham testified that after the CIA decided to stop the United States—South American drug monitoring, NSA began to review the legality and appropriateness of its efforts in support of BNDD. Although NSA is not prohibited by statute or executive directive from disseminating information that may pertain to law enforcement, it has always viewed its sole mission as the collection and dissemination of foreign intelligence. A senior NSA official testified: "We do not understand our mission to be one of supporting an agency with a law enforcement responsibility." [77]

---

[73] Memorandum from Houston to Acting Chief, Division D, 1/29/73.

[74] 18 U.S.C. 2511 (Omnibus Act, 1968) states: "nothing contained in . . . Section 605 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States. . . ."

However, the *Keith* case (407 U.S. 297 (1972)) held that the Omnibus Act was simply a congressional recognition of the President's constitutional powers to protect the nation's security and did not grant the Executive additional powers. The Act did not further define the 1934 statute or provide the Executive with any additional authority to conduct foreign intelligence.

[75] Senior NSA official No. 2, 9/18/75, p. 117.

[76] Buffham, 9/12/75, pp. 23, 71.

See also former NSA Deputy Director Louis Tordella's testimony of 9/21/75, p. 77: "It was in their General Counsel's opinion beyond CIA's charter to monitor radio communications on U.S. soil and I was told that if they could move a group of Cubans up to Canada it would be quite all right, but they would not do it in the United States."

Although BNDD clearly was a law enforcement agency, NSA initially held that the intelligence it was supplying BNDD was a part of a legitimate USIB-approved effort to prevent drugs from entering the United States.[78] This international aspect of the requirement was interpreted by NSA as sufficient justification for classifying the activity as part of its "foreign intelligence" mission.

After discussions with the General Counsel's office at NSA and within the Office of the Secretary of Defense, the Director of NSA terminated the activity in June 1973.[79] All of NSA's drug materials—product, internal memoranda, and administrative documents—were destroyed in late August or early September 1973. Ordinarily, NSA keeps material for five years or more. According to a senior NSA official: "it wasn't thought we would get back into the narcotics effort anytime soon. There didn't seem to be any point in keeping them." [80]

4. *Continuation of NSA's United States-South American Monitoring*

In June 1975 the Committee received information that NSA continued to monitor United States—South American telephone calls after the June 1973 termination of the drug watch list activity. NSA officials confirmed that the same links targeted for the purpose of curbing illegal drug traffic were monitored by NSA for foreign intelligence after June 1973. Certain of these links were monitored until July 9, 1975.[81]

According to NSA, this activity was terminated when "it did not prove productive." [82] While this effort was underway, NSA states that it did not collect or disseminate any information on narcotics traffic from the United States—South American links. A senior NSA official stated: "Nothing ever came. No by-product. The problem was dead." [83]

5. *Current Internal Policy Concerning Telephone Monitoring*

No statute or executive directive prohibits NSA's monitoring a telephone circuit with one terminal in the United States.[84] An internal NSA instruction was issued on August 7, 1975, that requires the personal approval of the chief of a major element within the Agency before monitoring of voice communications with a terminal in the United States is initiated. According to Deputy Director Buffham, "It is obvious that no such collection will be undertaken unless it is extremely important and is properly reviewed within the Agency." [85]

F. Termination of the Civil Disturbance Watch List Activity

The watch list activity involving civil disturbances was officially terminated in the fall of 1973. This was due to a combination of factors: growing concern within NSA regarding the program's vulnerability and propriety; the fact that courts were beginning to require the Government to reveal electronic surveillance conducted against particular criminal defendants; and the questions, raised by the drug watch list activity, about NSA's authority to engage in monitoring for law enforcement purposes. What follows is a description of events leading to the termination of the watch lists.

---

[77] Senior NSA official No. 1, 9/16/75, p. 10.
[78] Senior NSA official No. 1, 9/16/75, p. 10; Banner, 9/15/75, pp. 49–50.
[79] Allen, 10/29/75, Hearings, Vol. 5, pp. 14–15.
[80] Senior NSA official No. 2, 9/18/75, p. 91.
[81] *Ibid.*, p. 125.
[82] *Ibid*; Buffham, 9/12/75, p. 26.
[83] Senior NSA official No. 2, 9/18/75, p. 126.
[84] *Ibid.*, pp. 127–128.
[85] Buffham, 9/12/75, p. 30.

The only Supreme Court case addressing the issue of electronic surveillance purportedly undertaken for national security purposes is *United States* v. *United States District Court*, commonly referred to as the *Keith* case.[85a] The Supreme Court's decision was handed down on June 19, 1972, over a year before the watch list activity was terminated.

The case involved warrantless wiretaps on three U.S. citizens who were subsequently indicted for conspiracy to destroy Government property. There was no evidence of *foreign* participation in the alleged conspiracy.

After examining logs of the wiretaps *in camera*, the District Court judge had held that the surveillance on the defendants was unlawful and required that the overheard conversations be disclosed.[85b] The Supreme Court affirmed the District Court's ruling.

While recognizing the President's constitutional duty to "protect our Government against those who would subvert or overthrow it by unlawful means," [85c] the Court held that the power inherent in such a duty does not extend to the authorization of warrantless electronic surveillance deemed necessary to protect the nation from subversion by *domestic* organizations. The Court declared that the Fourth Amendment warrant requirement for electronic surveillance developed in two 1967 cases [86] applied, and that the electronic surveillances employed in the instant case were found to be unlawful. The Court did not reach the issue of whether the Executive has the constitutional power to authorize electronic surveillance without a warrant in cases involving the activities of *foreign* powers or agents.

Although the *Keith* ruling involved wiretaps and did not apply specifically to NSA, it did have a bearing on NSA's activities. Operation MINARET did entail warrantless electronic surveillance against certain domestic organizations. If there was no evidence to show that these domestic organizations were acting in concert with a foreign power, the *Keith* case would seem to cast doubts upon the legality of intercepting their messages without a warrant.

The watch list activity was never disclosed in a court proceeding; thus its legality has never been judicially determined. A 1973 criminal case did result in the Government's disclosure that some of a defendant's communications had been subject to a "foreign intelligence intercept." Some of the defendants in this 1973 case were members of a group which had been included on an NSA watch list by the Secret

---

[85a] 407 U.S. 297 (1972).
[85b] 444 F. 2d 651 (1971).
[85c] 407 U.S. at 310.
[86] *Katz* v. *United States*, 389 U.S. 347 (1967) and *Berger* v. *New York*, 388 U.S. 347 (1967). These two decisions deal with wiretaps, *not* with activities involving NSA. For further discussion, see the Committee's report on Warrantless Electronic Surveillance.

Service and FBI in mid-1971, and NSA had distributed some of their international communications to these agencies.[87] The propriety of these actions was never considered by the court, because the Government moved to dismiss the case rather than reveal the specifics of the watch list activity.

General Lew Allen, Jr. became the Director of NSA on August 15, 1973. In the course of familiarizing himself with his new responsibilities, he was fully briefed on the watch list activity.

According to Allen, the BNDD watch list activity had been terminated just prior to his arrival at NSA because the Agency feared "that it might not be possible to make a clear separation between requests for information submitted by BNDD as it pertained to legitimate foreign intelligence requirements and the law enforcement responsibility of BNDD." He also stated that the activity in support of the FBI, CIA, and Secret Service was suspended when NSA "stopped the distribution of information in the summer [August] of 1973." [88] Deputy Director Buffham told the Committee this dissemination was terminated due to three concerns: (1) NSA could not be certain as to what uses were being made of the information it was providing other agencies; (2) it feared that broad judicial discovery procedures might lead to the disclosure of sensitive intelligence sources and methods; and (3) NSA wanted to be "absolutely certain that we are providing information only for lawful purposes and in accordance with our foreign intelligence charter." [89]

During July and August 1973, meetings were held between NSA and Justice Department representatives. According to NSA, these discussions influenced the Agency's decision to suspend the dissemination of watch list material.[90] As Buffham testified:

> I believe although I am not positive, that Dr. Tordella, the Deputy Director, had discussions with people at Justice regarding the legality of our activities, and that these could have influenced then the determination in NSA to cease the activities in August, even though we had not yet received any formal statements from Justice.[91]

At a meeting on August 28, 1973, NSA officials informed Assistant Attorney General Henry Petersen that communications involving the defendants in the 1973 criminal case had been intercepted and that NSA opposed "any disclosure of this technique and program." [92] Petersen apprised Attorney General Richardson of these events in a memorandum of September 4, 1973. On September 7, 1973, Petersen sent a memorandum to FBI Director Clarence Kelley, requesting to be advised by September 10 of:

> the extent of the FBI's practice of requesting information intercepted by the NSA concerning domestic organizations

---

[87] Memorandum from Henry Petersen to Elliot Richardson, 9/4/73, p. 6.
[88] Allen, 10/29/75, Hearings, Vol. 5, p. 15.
[89] Buffham, 9/12/75, p. 67.
[90] Lew Allen, Jr., testimony, 9/15/75, p. 55.
[91] Buffham, 9/12/75, p. 67.
[92] Petersen to Richardson memorandum, 9/4/73, p. 6.

> or persons for intelligence, prosecutorial, or any other purposes . . . [and] any comments which you may desire to make concerning the impact of the *Keith* case upon such interceptions. . . .[93]

Kelley responded three days later that the FBI had requested intelligence from NSA "concerning organizations and individuals who are known to be involved in illegal and violent activities aimed at the destruction and overthrow of the United States Government." [94] He continued that the FBI did not view the materials supplied it by NSA, or the watch list activity in general, as inconsistent with the *Keith* decision: the information "cannot possibly be used for any prosecutive purpose" and "we do not consider the NSA information as electronic surveillance information in the sense that was the heart of the *Keith* decision." The FBI's position was that the information supplied by NSA did not result from specific targeting of an individual's communications in the same sense as a wiretap; therefore, it was not "electronic surveillance." Kelley maintained:

> We do not believe that the NSA actually participated in any electronic surveillance, per se of the defendants for any other agency of the government, since under the procedures used by that agency *they are unaware of the identity of any group or individual* which might be included in the recovery of national security intelligence information.[95] [Emphasis added.]

This position is difficult to defend since intelligence agencies, including the FBI, submitted specific American names for watch lists which resulted in the interception of Americans' international communications.

On September 17, Allen wrote FBI Director Kelley and the heads of other agencies receiving information from NSA regarding continuation of the watch list activity. Noting that "the need for proper handling of the list and related information has intensified, along with ever-increasing pressures for disclosure of sources by the Congress, the courts, and the press," Allen requested, "at the earliest possible date," that Kelley and the other agency heads "review the current list your agency has filed with us in order to satisfy yourself regarding the appropriateness of its contents. . . ." [96]

After receiving Kelley's September 10 memorandum, Petersen advised the Attorney General that the current number of individuals and organizations on NSA watch lists submitted by the FBI was "in excess of 600." [97] Petersen pointed out many legal problems arising from this program and recommended that

---

[93] Memorandum from Henry Petersen to Clarence Kelley, 9/7/73, p. 1.

[94] Memorandum from Clarence Kelley to Henry Petersen, 9/10/73, p. 2.

Kelley is clearly overstating his case when he says Americans are "known" to be involved in illegal activities. Many of the individuals were protesters speaking out against the Government's policies, not urging the overthrow of the Government.

J. Edgar Hoover discusses the necessity of obtaining information "determining the extent of international cooperation among New Leftists" in a memorandum to NSA of June 5, 1970, which is much broader than targeting individuals who are attempting the violent overthrow of the Government.

[95] Kelley memorandum, 9/10/73, pp. 3–5.

[96] Letter from Lew Allen, Jr. to Clarence Kelley, 9/17/73, Hearings, Vol. 5, Exhibit No. 6, pp. 158–159.

> the FBI and Secret Service be immediately advised to cease and desist requesting NSA to disseminate to them information concerning individuals and organizations obtained through NSA electronic coverage and that NSA should be informed not to disclose voluntarily such information to Secret Service or the FBI unless NSA has picked up the information on its own initiative in pursuit of its foreign intelligence mission.[98]

He also recommended that the standards and procedures which applied to "cases where the FBI seeks to acquire foreign intelligence or counterespionage information by means of its own listening devices" be extended to apply to the watch list activity.[98a] These procedures included obtaining prior written approval by the Attorney General.

On October 1, Richardson sent memoranda to FBI Director Kelley and the Director of the Secret Service, instructing them to cease requesting information obtained by NSA "by means of electronic surveillance." [99] The Attorney General also requested that his approval be sought prior to either agency's renewing requests to NSA for foreign intelligence or counterespionage information.

On the same day, Richardson sent a letter to Allen, stating that he found the watch list activity to be of questionable legality in view of the *Keith* decision, and requesting that NSA "immediately curtail the further dissemination" of watch list information to the FBI and Secret Service. Although Richardson specified that NSA was not to respond to "a request from another agency to monitor in connection with a matter that can only be considered one of domestic intelligence," he stated that "relevant information acquired by you in the routine pursuit of the collection of foreign intelligence information may continue to be furnished to appropriate Government agenices." [100]

Kelley responded to Richardson's memorandum on October 3 and agreed to comply with the Attorney General's "instructions to discontinue requests to NSA for electronic surveillance information and to obtain approval prior to any future inquires to NSA for such information." [101] There was apparently some confusion at this point whether Richardson's instructions meant that NSA was prohibited from disseminating *any* information to FBI. After further consultations, it was determined that the caveats Richardson placed on dissemination applied only to information on American citizens and organizations, and not to foreign intelligence and counterespionage matters.

Allen replied to Richardson's letter on October 4, stating that he had "directed that no further information be disseminated to the

---

[97] Memorandum from Henry Petersen to Elliot Richarson, 9/21/73, p. 1.
[98] Petersen to Richardson memorandum, 9/21/73, p. 3.
[98a] *Ibid.*
[99] Memorandum from Elliot Richardson to Clarence Kelley, 10/1/73.
[100] Letter from Elliot Richardson to Lew Allen, Jr., 10/1/73, Hearings, Vol. 5, Exhibit No. 7, pp. 160, 161.
[101] Memorandum from Clarence Kelley to Elliot Richardson, 10/3/73.

FBI and Secret Service, pending advice on legal issues."[102] Although Allen had agreed to suspend dissemination, NSA's position remained that these communications had always been collected "as an incidental and unintended act in the conduct of the interception of foreign communications." Allen thus asserted that NSA's "current practice conforms with your [Richardson's] guidance that, 'relevant information acquired [by NSA] in the routine pursuit of the collection of foreign intelligence information may continue to be furnished to appropriate government agencies.' "[103]

As a result of these and other exchanges between officials at NSA and Justice, the Agency officially terminated its watch list activity involving American citizens and organizations in the fall of 1973. It would no longer accept such names from other agencies for the purpose of monitoring their international communications.

To a substantial degree, this decision was prompted by the legal implications of the Keith case and by NSA's fear that criminal prosecutions of persons on the watch lists would inevitably lead to disclosure of its intelligence sources and methods. Indeed, the 1973 criminal case referred to above posed the threat that the watch list activity might have to be disclosed for the first time in a public forum.

It is important to note that the decision to terminate the watch list was ultimately the administrative decision of an executive agency. There is no statute which expressly forbids such activity, and no court case where it has been squarely at issue. Without legislative controls, NSA could resume the watch list activity at any time upon order of the Executive.

G. Authorization

Authorization of the watch list activity must be viewed in the context of how NSA operates. It is a service agency which provides foreign intelligence information at the request of consumer agencies. Specific requirements are levied on USA, although the Agency also engages in collection activities that are not responsive to specific tasking. For example, many USIB requirements—such as those aimed at terrorist activities, gathering economic intelligence, or discovering foreign links to civil disturbances—were so broad that NSA was given wide discretion for selecting not only the communications channels to be monitored, but also what information was disseminated.[104] While this is often appropriate because only NSA has the knowledge and expertise to make these decisions, it also allows NSA considerable flexibility in carrying out its mission.

NSA also responds to specific requests from other Federal agencies. Indeed, it is no exaggeration to state that NSA's operations are undertaken almost entirely to satisfy the intelligence needs of other agencies. The watch list activity was no exception.

---

[102] Letter from Lew Allen, Jr. to Elliot Richardson, October 4, 1973, Hearings, Vol. 5, Exhibit No. 8, p. 163.

[103] Allen letter, October 4, 1973, Hearings, Vol. 5, Exhibit No. 8, pp. 162, 163.

[104] Wannall (FBI), October 3, 1975, p. 12: "I would say that by far the majority of the product that I saw would have been information that would have been disseminated to us by NSA, based upon the knowledge of that Agency of our responsibilities, as opposed to a specific request for any information that might come to NSA's attention, that we ourselves initiated."

1. Knowledge and Authorization Outside NSA

In the case of the 1967–1973 watch list activity, NSA clearly received instructions from the Army in 1967 to look for possible foreign influence on, or control of, American peace and Black power activists. NSA subsequently received the names of American and foreign citizens and groups from other intelligence agencies.

This activity was not formally approved by USIB. Although NSA notified USIB members that it was responding to the Army's request, the inclusion of American names on an NSA watch list was never discussed at subsequent USIB meetings. Although there were official USIB requirements for information concerning international drug activity, presidential protection, and terrorism, there was no approval or discussion of targeting American citizens. NSA officials contend that the submission of American names by USIB members constituted approval.[105]

The desire for tight security over the watch list program resulted in limiting participation to those "with a need to know." Therefore, it was not in NSAs best interests to have formal USIB approval of a requirement since knowledge would have been more widely spread.

According to documents supplied to the Committee and testimony of NSA officials, Defense Secretaries Melvin Laird and James Schlesinger, as well as Attorneys General John Mitchell and Richard Kleindienst, were informed that NSA was monitoring Americans. Former NSA Director, Admiral Noel Gayler sent a Top Secret "Eyes Only" memorandum to Laird and Mitchell on January 26, 1971, which outlined ground rules for "NSA's Contribution to Domestic Intelligence." In this memorandum, Gayler refers to a discussion he had earlier that day with both men on how NSA could assist them with "intelligence bearing on domestic problems." The memorandum mentioned the monitoring for drug trafficking and foreign support of subversive activities, but did not discuss "watch lists" specifically.[106]

NSA Deputy Director Buffham supplied the Committee with a Memorandum for Record which indicated that he had personally shown the Gayler memorandum to Mitchell and had been told by the Military Assistant to Secretary of Defense Laird that the Secretary had read and agreed to the memorandum.[107] In a handwritten note made available to the Committee, Gayler recalls that he personally showed the January 26, 1971, memorandum to Kleindienst on July 1, 1972.

---

[105] Allen, 10/29/75, Hearings, Vol. 5, p. 28.

[106] Memorandum from NSA Director Noel Gayler to the Secretary of Defense and the Attorney General, "NSA Contribution to Domestic Intelligence," 1/26/71, Hearings, Vol. 5, Exhibit No. 5, pp. 156–157.

This memorandum responded to the interests of the Intelligence Evaluation Committee (IEC), a Justice Department working group set up to carry out domestic intelligence-gathering activities. The IEC was an outgrowth of the Huston Plan and is detailed in the Committee's report on the Huston Plan. Suffice it to say that NSA sent a representative to that group and Gayler was providing them with a statement of NSA's capabilities and procedures for supplying intelligence.

[107] Memorandum for the Record, Benson K. Buffham, 2/3/71.

When questioned by the Committee, neither Mitchell, Laird, nor Kleindienst recalled the watch list activity. Mitchell does not recall NSA's involvement in monitoring the communications of American citizens or the meeting with Buffham. He stated, however, that "he may have" had such a meeting, but cannot recall. *John Mitchell testimony, 10/2/75, pp. 47–48.*

Finally, former NSA Deputy Director Tordella testified that he accompanied General Samuel C. Phillips, Gayler's successor as Director of NSA, to brief Secretary of Defense Schlesinger on the watch list in the summer of 1973.[108]

In summary, a number of Federal agencies were aware of NSA's watch lists and used them. It is clear that the United States Intelligence Board, which ordinarily set the intelligence requirements to which NSA responded, never gave its formal approval for the watch list activity. It also appears that at least two Attorneys General and two Secretaries of Defense were generally aware that NSA was monitoring the international communications of American citizens, but none took measures to halt the practice.

2. Knowledge and Approval Within NSA

There is a discrepancy in the testimony of knowledgeable NSA staff members and a former NSA Director with regard to his knowledge of the watch list activity. When asked whether NSA had included the names of American citizens or organizations on its watch lists, Admiral Noel Gayler (who was Director of NSA during the height of the activity) responded:

> I don't know that I even knew that in that specific way. I knew that communications of one foreign terminal sometimes concerned doings of interest of people, including American citizens, yes. And when I became aware of that, I can't tell you, I guess it was a year or so after I got there.[109]

Gayler became NSA Director in August 1969. He maintains that he first became aware of the watch list activity about the time of the June 1970 Huston plan for domestic surveillance, ten months after his arrival and eleven months after the MINARET Charter was issued.

Gayler was one of the original participants in the Huston plan deliberations and in the Intelligence Evaluation Committee (early 1971). Both of these efforts were designed to use the resources of NSA and other intelligence agencies to gather information on internal security matters. In fact, part of the Huston plan called for the expansion of the watch list activity. Buffham told the Committee that if the plan had been implemented he assumed "other intelligence agencies would then increase the numbers of names on their lists" and NSA would possibly target specific communications channels to obtain the international traffic of American citizens.[110] NSA was par-

---

[108] Tordella, 9/21/75, p. 74.
[109] Noel Gayler testimony, 6/19/75, p. 64.
[110] Buffham, 10/29/75, Hearings, Vol. 5, p. 45.
In addition, the Huston Plan report sent to the participants was classified "Top Secret, Handle Via COMINT Channels Only," the classification placed on NSA intercept information. This caveat was designed to limit the distribution of the report and prevent disclosure of the illegal activities suggested by Tom Charles Huston. For a further explanation, see the Committee's report, "National Security, Civil Liberties, and the Collection of Intelligence: A Report on the Huston Plan."

69-984 O - 76 - 49

ticularly concerned that the executive branch directives would have had to be changed to permit such an expansion. The alternatives outlined in the Huston plan included the recommendation that the controling NSCID and the relevant DCID be changed to allow NSA to target international communications links carrying the messages of American citizens.

NSA was already engaged in watch list activity which although it did not involve targeting of specific communications links, did involve targeting Americans by name. The Huston Plan states:

> NSA is currently doing so on a restricted basis, and the information it has provided has been most helpful. Much of this information is particularly useful to the White House. . . .[111]

As discussed earlier, the July 1, 1969, MINARET charter was designed to restrict knowledge of the watch list activity. It was released about a month before Gayler arrived at NSA and, according to a senior NSA official, Gayler "knew everything that was in it, what was going on, and endorsed it."[112] Gayler recalls that his first knowledge of the watch list came during the Huston Plan deliberations, almost a year later. Another senior NSA official testified that Gayler "*review every piece of MINARET product*" and maintained that "the Director kept a close eye on this activity and reviewed the requirements." [Emphasis added.][113] This employee also testified that Gayler was shown the product of the watch list activity and was kept fully informed.

H. Conclusions

NSA's monitoring of international communications comprises only a portion of its total mission, but the examination of this capability to intrude on the telephone calls and telegrams of Americans represents a major part of the Committee's work on NSA. The watch list activities and the sophisticated technological capabilities that they highlight present some of the most crucial privacy issues facing this nation. Space age technology has outpaced the law. The secrecy that has surrounded much of NSA's activities and the lack of Congressional oversight have prevented, in the past, bringing statutes in line with NSA's capabilities. Neither the courts nor Congress have dealt with the interception of communications using NSA's highly sensitive and complex technology.

The analysis presented here of the deliberate targeting of American citizens and the associated incidental interception of their communications demonstrates the need for a legislative charter that will define, limit, and control the signals intelligence activities of the National Security Agency. This should be accomplished both to preserve and protect the Government's legitimate foreign intelligence operations, and to ensure that the constitutional rights of Americans are safeguarded.

---

[111] Memorandum from Tom Charles Huston to H. R. Haldeman, 7/7 "Operational Restraints on Intelligence Collection," p. 1, Hearings, Vol. 2, Exhibit No. 2, p. 193.
[112] Senior NSA official No. 2, 9/18/75, pp. 43–44.
[113] Senior NSA official No. 1, 9/16/75, pp. 63, 62.

The next section describes a recently terminated NSA collection program which also involved United States citizens—Operation SHAMROCK. This program did not require any special technology; international telegrams were simply turned over to NSA at the offices of three cable companies.

III. A SPECIAL NSA COLLECTION PROGRAM: SHAMROCK

SHAMROCK is the codename for a special program in which NSA received copies of most international telegrams leaving the United States between August 1945 and May 1975. Two of the participating international telegraph companies—RCA Global and ITT World Communications—provided virtually all their international message traffic to NSA. The third, Western Union International, only provided copies of certain foreign traffic from 1945 until 1972. SHAM ROCK was probably the largest governmental interception program affecting Americans ever undertaken. Although the total number of telegrams read during its course is not available, NSA estimates that in the last two or three years of SHAMROCK's existence, about 150,000 telegrams per month were reviewed by NSA analysts.[115]

Initially, NSA received copies of international telegrams in the form of microfilm or paper tapes. These were sorted manually to obtain foreign messages. When RCA Global and ITT World Communications switched to magnetic tapes in the 1960s, NSA made copies of these tapes and subjected them to an electronic sorting process. This means that the international telegrams of American citizens on the "watch lists" could be selected out and disseminated.

A. Legal Restrictions

1. The Fourth Amendment to the Constitution of the United States

Obtaining the international telegrams of American citizens by NSA at the offices of the telegraph companies appears to violate the privacy of these citizens, as protected by the Fourth Amendment. That Amendment guarantees to the people the right to be "secure . . . in their papers . . . against unreasonable searches and seizures." It also provides that "no Warrants shall issue, but upon probable cause." In no case did NSA obtain a search warrant prior to obtaining a telegram.

2. Section 605 of the Communications Act of 1934 (47 U.S.C. 605)

As enacted in 1934, eleven years before SHAMROCK began, section 605 of the Communications Act provided:

> No person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof. . . .

Section 605 was amended in 1968 by the addition of the phrase: "Except as authorized by chapter 119, Title 18, no person . . . ."

---

[115] Staff summary of interview with senior NSA official No. 3, 9/17/75, p. 3.

The import of this 1968 addition, however, is not clear, and the Supreme Court has yet to rule on the point.[116]

The relevant provision in chapter 119, section 2511 (3), provides that "nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States. . . ." [117] Yet the Supreme Court, in the *Keith* decision (1972), held that this section "confers no power" and "merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution." [118]

It is thus uncertain what the phrase in the 1968 amendment to section 605—"except as *authorized* by chapter 119, title 18" [Emphasis added.]—means. The Supreme Court has held that the relevant section of chapter 119 does not *authorize* any activity. The applicability of section 605 to the interception of international telegrams for foreign intelligence purposes is therefore unclear. It would appear that where such telegrams are intercepted for other than foreign intelligence purposes (e.g., the watch list activity), section 605 would be violated.

3. The Controlling National Security Council Intelligence Directive

Since 1958, this executive directive has authorized NSA to conduct communications intelligence activities.[119] These have been defined as *excluding* "the intercept and processing of unencrypted written communications." It would appear that if copies of international telegrams are "written communications," NSA has exceeded its authority under the executive's own internal directives.

B. The Committee's Investigation

The SHAMROCK operation was alluded to in documents furnished to the Committee by the Rockefeller Commission in May 1975. They indicated that CIA had provided "cover" for an NSA operation in New York where international telegrams had been copied.[120]

In early June 1975, an oral inquiry regarding the operation was made to NSA officials, but no confirmation of the project was forthcoming. In July, the Committee sent written interrogatories to NSA, and was told that this subject was so sensitive that it would be disclosed only to Senators Church and Tower. No such briefing was immediately arranged, however.

In July and August, news stories were published which appeared to reveal small parts of the SHAMROCK operation.[121]

The Committee continued to press the matter with NSA, and in early September the agency gave the Committee its first detailed

---

[116] The U.S. Court of Appeals for the Third Circuit did rule, in *U.S.* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974), *cert. denied sub nom. Ivanov* v. *United States*, 419 U.S. 881 (1974), that section 605 did not render unlawful electronic surveillance conducted solely for foreign intelligence purposes.

[117] 18 U.S.C. 2511(3).

[118] *United States v. United States District Court for the Eastern District of Michigan, et al.*, 407 U.S. 297 (1972). See pp. 757, 759–760.

[119] See pp. 737–738.

[120] Commission on CIA Activities Within the United States, interview with senior CIA officials, 3/11/75, pp. 14–16, in Select Committee files.

[121] See Frank Van Riper, "Find U.S. Agents Spy on Embassies' Cables," *New York Daily News*, 7/22/75; *idem.*, "FCC Terms Cable-Tapping Illegal, Will Investigate FBI," *New York Daily News*, 7/23/75; Nicholas Horrock. "National Security Agency Reported Eavesdropping on Most Private Cables," *New York Times*, 8/1/75, p. 1.